

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

ASSOCIATED GENERAL  
CONTRACTORS OF WASHINGTON,  
BUILDING INDUSTRY ASSOCIATION OF  
WASHINGTON, SNOHOMISH COUNTY,  
AND PUGET SOUND KEEPER  
ALLIANCE,

Appellants,

And

ASSOCIATION OF WASHINGTON  
BUSINESS,

Intervenor,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB NO. 05-157

PCHB NO. 05-158

PCHB NO. 05-159

ORDER ON PSA's THIRD MOTION FOR  
PARTIAL SUMMARY JUDGMENT  
(Issue Nine)

On July 24, 2006, Appellant Puget Sound Keeper Alliance (PSA) filed its Third Motion for Partial Summary Judgment on Issue Nine, as set out in the Pre-Hearing Order in this appeal.

The Motion is opposed by Associated General Contractors of Washington and Building Industry

ORDER ON SUMMARY JUDGMENT

PCHB NO. 05-157, 158, and 159

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1 Association of Washington (AGC/BIAW), Association of Washington Business (AWB),  
2 Washington State Department of Ecology (Ecology), and Snohomish County (County).

3 The Board hearing this matter was comprised of William H. Lynch, Chair, Kathleen D.  
4 Mix, and Andrea McNamara Doyle. Administrative Appeals Judge, Kay M. Brown presided for  
5 the Board.

6 The following documents were received and considered in ruling on this motion:

- 7 1. PSA's Third Motion for Partial Summary Judgment, attached Exhibits 1-3, and  
attached excerpts from Deposition of Jeff Killelea;
- 8 2. AGC and BIAW's Opposition to PSA's Third Motion for Partial Summary  
9 Judgment, Declaration of Nathan A. Graves in Support of AGC and BIAW's  
10 Opposition to PSA's Third Motion for Partial Summary Judgment, with attached  
Exhibits A-C, Declaration of Jodi Slavik in Support of AGC and BIAW's  
11 Opposition to PSA's Third Motion for Partial Summary Judgment,<sup>1</sup> Declaration  
of James A. Tupper, Jr. in Support of AGC and BIAW's Opposition to PSA's  
12 Third Motion for Partial Summary Judgment, with attached Exhibits 1-11;
- 13 3. AWB's Opposition to PSA's Third Motion for Summary Judgment and  
Declaration of Kris Tefft in Support of AWB's Opposition to PSA's Third Motion  
14 for Summary Judgment with attached Exhibit 1;
- 15 4. Respondent Ecology's Response in Opposition to PSA's Third Motion for Partial  
Summary Judgment;
- 16 5. Response of Snohomish County to PSA's Third Motion for Partial Summary  
Judgment; and,
- 17 6. PSA's Reply Supporting Third Motion for Partial Summary Judgment with  
attached excerpts from Deposition of Jeff Killelea and Exhibit 4.

18 Based on the record and evidence before the Board on the motions for partial summary  
19 judgment, the Board enters the following decision.  
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<sup>1</sup> The Motion to Strike this Declaration is addressed in a separate order.

## Procedural Background

Ecology issued the Construction Stormwater General Permit for Discharges Associated with Construction (Permit) on November 16, 2005. AGC and BIAW filed an appeal of the Permit on December 15, 2005. The County and PSA filed appeals of the same Permit on December 16, 2005. The appeals were consolidated, and the Association of Washington Business (AWB) was allowed to intervene. A pre-hearing order was issued that established 36 legal issues in the consolidated appeals. Seven of these issues, plus the general issue of PSA's standing, have already been addressed by this Board in its Order on Summary Judgment issued on October 26, 2006. *See AGC/BIAW v. Ecology*, Order on Summary Judgment, PCHB No. 05-157, 158 and 159 (Oct. 26, 2006). A single issue, Issue 9, is the subject of this motion. The issue is:

Is Condition S4. unreasonable or unlawful in its postponement of water quality sampling requirements?

## Facts

Ecology issued the Construction Stormwater General Permit on November 16, 2005. The Permit regulates discharges from construction sites that result in the disturbance of one acre or more. The one acre permitting threshold is a change from the prior construction stormwater general permit which had a minimum permitting threshold of five acres of soil disturbance. This means that, for the first time, sites between one and five acres are subject to regulation under a

1 National Pollution Discharge Elimination System (NPDES) permit.<sup>2</sup> All permittees covered  
2 under the Permit, including sites between one and five acres, will be required to implement  
3 Stormwater Pollution Prevention Plans (SWPPP), conduct site inspections, and make  
4 adjustments to their SWPPPs if site inspections indicate the need to do so in order to improve the  
5 quality of stormwater discharges. *Tupper Dec., Ex. 1, Graves Dec., Ex. B.*

6 The Permit condition challenged, Condition S4, addresses the monitoring requirements of  
7 the Permit. The general monitoring regime contained in Condition S4 consists of weekly site  
8 inspections, periodic sampling with turbidity meters and/or transparency tubes, and specified pH  
9 sampling. Starting October 1, 2006, sites of five acres or more are required to perform turbidity  
10 sampling. However, the requirement for sites of one to five acres to perform either turbidity or  
11 transparency tube monitoring is not effective until October 1, 2008. Up to eighty percent of  
12 permittees – as many as 4,000 of the possible 5,000 permittees – are expected to fall into the one  
13 to five acre category. *Tupper Dec., Ex. 1, PSA's Motion, attached excerpts from Deposition of*  
14 *Killelea.*

15 While the Permit does not require one to five acre sites to begin sampling before October  
16 1, 2008, it does immediately require visual inspections of all disturbed areas, all BMPs, and all  
17 stormwater discharge points at least once every calendar week and within 24 hours of any  
18 stormwater discharge from the site. It requires that stormwater be visually examined for the  
19 presence of suspended sediment, turbidity, discoloration, and oil sheen. Inspections must be  
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<sup>2</sup> This can be contrasted with sites five acres or larger, which have been regulated by Ecology since November 1992.

1 performed by a Certified Erosion and Sediment Control Lead (CESCL) and documented in an  
2 inspection report or checklist. The inspector must include in the inspection report or checklist a  
3 description of any stormwater discharged from the site, noting the presence of any suspended  
4 sediment, turbid water, discoloration, and/or oil sheen present. The inspector must also evaluate  
5 the BMPs in effect to determine if it is necessary to install, maintain, or repair BMPs to improve  
6 stormwater discharge quality. Permittees are required to take action to correct any problems  
7 identified during an inspection, including appropriate source control and/or treatment BMPs, and  
8 to document BMP implementation and maintenance in the site log book. *Tupper Dec., Ex. 1.*

9 PSA contends that the delay in requiring turbidity or transparency sampling for the one to  
10 five acre sites violates RCW 90.48.555(8), and frustrates the effectiveness of the Permit.

## 11 Analysis

### 12 1. Summary Judgment

13 Summary judgment is a procedure available to avoid unnecessary trials on formal issues  
14 that cannot be factually supported and could not lead to, or result in, a favorable outcome to the  
15 opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 107, 108, 569 P.2d 1152 (1977). The  
16 summary judgment procedure is designed to eliminate trial if only questions of law remain for  
17 resolution. Summary judgment is appropriate when the only controversy involves the meaning  
18 of statutes, and neither party contests the facts relevant to a legal determination. *Rainier Nat'l*  
19 *Bank v. Security State Bank*, 59 Wn.App. 161, 164, 796 P.2d 443 (1990), *rev. denied*, 117 Wn.2d  
20 1004 (1991).

1 The party moving for summary judgment must show there are no genuine issues of  
2 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*  
3 *Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a  
4 summary judgment proceeding is one that will affect the outcome under the governing law.  
5 *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). In a summary judgment, all facts  
6 and reasonable inferences must be construed in favor of the nonmoving party as they have been  
7 in this case. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

8 Here, there are no contested issues of material fact related to this single issue motion for  
9 partial summary judgment. The Board concludes that it is appropriate to grant summary  
10 judgment on Issues 9 in favor of the parties opposing PSA's motion.<sup>3</sup>

11 2. Postponement of Monitoring on One to Five Acre Sites.

12 PSA contends that postponement of turbidity or transparency sampling on one to five  
13 acre sites violates the requirements of RCW 90.48.555(8). This provision sets out requirements  
14 for construction and industrial stormwater general permits, as follows:

15 (8)(a) Construction and industrial storm water general permits issued by the department  
16 shall include an enforceable adaptive management mechanism that includes appropriate  
17 monitoring, evaluation, and reporting. The adaptive management mechanism shall  
18 include elements designed to result in permit compliance and shall include, at a  
19 minimum, the following elements:

- 18 (i) An adaptive management indicator, such as monitoring benchmarks;
- 19 (ii) Monitoring;
- 20 (iii) Review and revisions to the storm water pollution prevention plan;
- 21 (iv) Documentation of remedial actions taken; and

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<sup>3</sup> Summary judgment may be granted to the non-moving party when the facts are not in dispute. *Impecoven v. Department of Revenue*, 120 Wn.2d 357, 365, 842 P.2d 470 (1992).

1 (v) Reporting to the department.

2 (b) Construction and industrial storm water general permits issued by the department also  
3 shall include the timing and mechanisms for implementation of treatment best  
management practices.

4 The statute requires “an enforceable adaptive management mechanism that includes  
5 appropriate monitoring.” PSA argues that only water quality sampling satisfies this requirement.  
6 The Board rejects this argument.

7 The express language of the statute does not require water quality sampling. PSA argues,  
8 however, that an “adaptive management indicator,” must include an objective comparison of  
9 circumstances at the regulated site, to a defined standard. They argue that turbidity/transparency  
10 samples, measured against benchmarks, are the means by which the Permit satisfies the statutory  
11 requirement for an adaptive management indicator. Visual inspection provisions of the Permit  
12 alone cannot satisfy this requirement because they do not involve an objective comparison,  
13 according to PSA. Therefore, by postponing the sampling requirement for one to five acre sites,  
14 PSA argues the Permit does not comply with the statute.

15 The Permit does set out standards and criteria for visual examination of stormwater.  
16 Permit Condition S4.B.1. provides that “Stormwater shall be visually examined for the presence  
17 of suspended sediment, turbidity, discoloration, and oil sheen.” The Permit requires these visual  
18 examinations to be conducted by certified inspectors, who must include written notes in their  
19 inspection reports of the presence of these constituents in any observed stormwater discharges.  
20 Permit Condition S4.B.h. also requires inspectors to make judgments about the site’s compliance  
21 with the terms and conditions of the SWPPP and the Permit. The Permit also requires that

1 corrective actions be taken to “install, maintain, or repair BMPs to improve the quality of  
2 stormwater discharges” in response to problems identified as a result of inspections. While this  
3 adaptive management process might be more objective if it relied on numeric benchmarks, it is  
4 not so subjective as to be unenforceable.

5         Given that construction sites between one and five acres in size are moving from being  
6 unregulated (as to their stormwater) to conducting regular water stormwater sampling in less  
7 than two years, the Board concludes that an intermediate step of visual inspection is appropriate  
8 for a time limited period. Ecology’s decision to postpone the sampling requirement on one to  
9 five acre sites until October 1, 2008, is not an unlawful or unreasonable exercise of its discretion.  
10 RCW 90.48.555(8) (b) confers on Ecology the discretion to set the “timing and mechanisms for  
11 implementation of treatment best management practices.” In exercising this discretion,  
12 consistent with the 1994 Regulatory Fairness Act, Chapter 19.85 RCW, Ecology must consider  
13 the economic impact of every general permit which is intended to directly cover small business.  
14 WAC 173-226-120. The purpose of the economic analysis is to reduce the economic impact of  
15 the general permit on small business when it is legal and feasible, while still meeting the stated  
16 objectives of the federal and state water pollution control laws. WAC 173-226-120 (2). In  
17 postponing sampling requirements on sites between one and five acres for an initial two year  
18 period, while immediately implementing a visual inspection program tied to BMPs, Ecology has  
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1 taken a rational approach to reducing the impact to small business while still protecting water  
2 quality.<sup>4</sup>

3 PSA also argues that, by postponing the sampling requirement for one to five acre sites,  
4 Ecology will be deprived of the benefits of information necessary to make reasonable potential  
5 determinations in the future. AGC/BIAW and AWB respond that Ecology is not required to  
6 perform a reasonable potential analysis and such an analysis could not be conducted based on  
7 grab samples collected under the Permit monitoring scheme anyway. The Board declines to  
8 address the question of reasonable potential analysis when it is not necessary to decide the issue  
9 before it on summary judgment.

10 The Board concludes, as a matter of law, that postponing the requirement of sampling for  
11 one to five acre sites until October 1, 2008, does not violate RCW 90.48.555(8), nor is it an  
12 unlawful or unreasonable exercise of Ecology's discretion.

13 Based on the foregoing analysis, the Board enters the following  
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20 <sup>4</sup> During the course of a two-year study on stormwater quality at construction sites, Ecology found that every site  
21 visited had at least one of three BMPs in use at the site. Ecology also determined that managers at most sites  
appeared to have made concerted efforts to protect water quality and not direct stormwater discharges into area  
streams. *Tupper Dec., Ex. 10, at p.21.*

ORDER

The Board denies PSA's Third Motion for Partial Summary Judgment on Issue 9, and grants summary judgment to AGC/BIAW, AWB, Ecology, and Snohomish County on this issue.

DONE this 27<sup>th</sup> day of November 2006.

POLLUTION CONTROL HEARINGS BOARD

William H. Lynch, Chair

Kathleen D. Mix, Member

Andrea McNamara Doyle, Member

Kay M. Brown, Presiding  
Administrative Appeals Judge

## Administrative Appeals Judge